

1
2
3
4
5
6
7
8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 SAN FRANCISCO DIVISION
11

12 *IN RE: ZOOM VIDEO COMMUNICATIONS*
13 *INC. PRIVACY LITIGATION,*

Master Case No. 3:20-cv-02155-LB

14
15 This Document Relates To:
16 All Actions /

**MOTION FOR AWARD OF
ATTORNEYS' FEES AND INCENTIVE
AWARD TO OBJECTOR COHEN**

Hon. Laurel Beeler
Courtroom: B
Date: February 2, 2023
Time: 9:30 AM

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD: PLEASE TAKE NOTICE that on February 2, 2023, at 9:30 AM, or as soon thereafter as the matter may be heard before the Honorable Magistrate Judge Laurel Beeler, of the United States District Court for the Northern District of California, San Francisco Division, located at Courtroom B, 15th floor, 450 Golden Gate Avenue, San Francisco, California, 94102, objector Judith Cohen will and hereby does move the Court for an an incentive award of \$1,000 and an award of \$78,000 comprised of attorneys' fees in the amount of \$77,153, and reimbursement of costs of \$847 pursuant to Fed. R. Civ. P. 23(h).

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On December 16, 2022, the Court approved the settlement as modified to resolve the objections to the settlement. ECF No.261. As noted in Plaintiffs' and Zoom's Joint Motion for Approval of Settlements with Objector-Appellants and Amendment of the Settlement Agreement (ECF No. 260), the amended settlement has only been revised in favor of the class and the revised settlement provides additional procedural and substantive benefits to Settlement Class Members. In response to Ms. Cohen's objection, the revised agreement provides an important benefit to a significant portion of the Class that neutralizes future risks that were brought to light by this litigation. This modification was reached after prolonged, arms-length negotiations. Ms. Cohen should be entitled to an incentive award and to an award of attorney's fees which are documented, consistent with (though lower than) hourly rates of fees already granted to Plaintiffs' counsel, and which will not reduce any of the return to the Class.

II. BACKGROUND

Plaintiffs brought this action to stop Zoom from invading consumers' privacy, from promoting its product under false assurances of privacy, to seek compensation for past privacy violations, and to ensure that Zoom vastly improves its security practices going forward. See, Amended Complaint, ECF No. 126.

On March 11, 2021, the Court denied Zoom's motion to dismiss as to certain claims arising from "Zoombombing," claims of violations of implied contract, breach of the covenant of good

1 faith and fair dealing, claims under the unlawful and unfair prongs of the UCL, and a derivative
 2 claim of unjust enrichment. The Court granted the motion to dismiss, with leave to amend,
 3 regarding several other claims including claims for negligence and invasion of privacy. See Order
 4 re Motion to Dismiss (ECF No. 168) at 40.

5 Plaintiffs filed a Second Amended Complaint on May 12, 2021 alleging that Zoom placed
 6 insufficient attention on ensuring security and on “ensuring that Zoom users’ private moments
 7 would not be shared with, exploited by, or obscenely hijacked by others.” Second Amended
 8 Complant ECF No. 179 at ¶¶ 1, 16. *Id.* ¶ 3. Plaintiffs alleged that the Zoom iPhone app was
 9 sending users’ personal data to Facebook and that “Zoom was providing a trove of data to third
 10 parties.” *Id.* ¶ 5. Further, the operative complaint alleged that Zoom’s claims that it implemented
 11 end-to-end encryption (“E2E”)—widely understood as the most private form of internet
 12 communication—was misleading since Zoom was able to access unencrypted video and audio from
 13 meetings. *Id.* ¶ 7. The complaint alleged that security breaches by unauthorized bad actors who
 14 hijack Zoom videoconferences was continuing. *Id.* ¶ 9.

15 The Second Amended Complaint was not tested further as the parties reached a settlement
 16 and Plaintiffs moved for preliminary approval on July 31, 2021 (ECF No. 190), which the Court
 17 granted on October 21, 2022. ECF No. 204. Objector Cohen filed an Objection to Plaintiffs’
 18 Motion for Final Approval, ECF No. 227, as did Objectors Rodgers and Neace, ECF No. 228
 19 (collectively, the “Objections”). The Court granted final approval of the settlement agreement over
 20 the objections, from which the Objectors each appealed. ECF Nos. 251 & 252. Following extensive
 21 arms-length settlement negotiations coordinated by the Circuit Mediator for the Ninth Circuit,
 22 Plaintiffs, Zoom, and the Objectors agreed to settle the Objections and appeals.

23 **A. Cohen’s Objection**

24 After Cohen received a notice of the settlement, she consulted with the undersigned counsel
 25 about the the nature of the claims, the settlement agreement, and the scope of the release. Because
 26 the class complaint included allegations that Zoom had failed to incorporate E2E encryption into
 27 its video-conferencing software during the class period, Cohen recognized the possibility that her
 28 use of Zoom in online therapy sessions could be construed to mean that she 1) violated HIPAA; 2)

1 breached her own contract with her patients in which she guaranteed confidentiality; and 3)
 2 breached a fiduciary duty of confidentiality to her patients.

3 As the Court noted, the claims and the settlement pertained to customers not receiving the
 4 benefit of their bargain for Zoom's services. The settlement agreement, however, was more broad
 5 and defined "Released Claims" to include

6 any and all actual or potential claims, complaints, demands,
 7 damages, debts, liabilities, proceedings, remedies, counterclaims,
 8 actions, causes of action, suits, **cross claims, third party claims,**
 9 **contentions, allegations, assertions of wrongdoing,** and any
 10 demands for injunctive relief or any other type of equitable or legal
 11 relief, whether known or unknown, suspected or unsuspected,
 12 asserted or unasserted, contingent or non-contingent, discovered or
 undiscovered, brought or that could be brought against any of the
 Released Parties, and that **are based on one or more of the same**
factual predicates as the Action, in any court, tribunal, forum or
proceeding.

13 Professionals, such as Cohen, who are subject to contractual or statutory confidentiality
 14 obligations face the prospect of claims that they breached those obligations to their clients by virtue
 15 of the fact that Zoom's E2E encryption was flawed as alleged in the Second Amended Complaint.
 16 A disgruntled client, a client disputing an invoice, or entrepreneurial attorney, could use the
 17 allegations in the Complaint to assert a direct claim against a professional and allege that, by using
 18 Zoom, the professional did not live up to their own contractual, statutory, or fiduciary duties to
 19 ensure confidentiality. Consequently, the professional arguably breached their own contract and
 20 their fiduciary duties to the client. As originally recorded in the settlement agreement, the release
 21 would preclude a professional from impleading Zoom if faced with a claim they breached their
 22 confidentiality obligations by virtue of the defects in Zoom's encryption that were alleged in this
 23 case.

24 Such a claim by a client would be poignant in a dispute regarding the professional's fee as
 25 one of the recognized remedies for a fiduciary duty violation is disgorgement of fees paid to the
 26 fiduciary. See *United States v. Project on Gov't Oversight*, 572 F. Supp. 2d 73, 76–77 (D.D.C.
 27 2008) (citing *Crandon v. United States*, 494 U.S. 152, 158, 110 S.Ct. 997, 108 L.Ed.2d 132 (1990);
 28 see also *United States v. Drisko*, 303 F.Supp. 858, 860 (E.D.Va.1969); *Burrow v. Arce*, 997 S.W.2d

229, 240 (Sup. Ct. Tex. 1999) (noting that fee forfeiture is a remedy for breach of fiduciary duty in Texas); *Parkinson v. Bevis*, 448 P.3d 1027, 1033 (S.Ct. Idaho 2019) (same in Idaho); *Joudeh v. PFAU Cochran Vertetis Amala, PLLC*, 190 Wash.App. 1030 at *1 (Ct.App. 2015) (same in Washington). This would be a particularly dire possibility for professionals, like Cohen, whose fees are paid by a client directly rather than by a third-party payor such as a health insurance company. See, Declaration of Judith Cohen (“Cohen Decl.”) at ¶3.

Cohen objected to the settlement agreement noting that the absence of E2E encryption put her, and similarly situated professionals in a position different from other class members. If true, allegations in the complaint exposed her to claims that she breached her contractual promises, along with her statutory, and ethical obligations. See Declaration of Judith C. Cohen submitted herewith. Cohen’s concerns over her potential personal liability caused her to appeal this Court’s decision finally approving the settlement agreement.

B. The Cohen Settlement

Plaintiffs, Zoom, and Cohen entered into a settlement agreement in which the Plaintiffs and Zoom agreed to modify the release in the Settlement Agreement to exclude certain claims against Zoom for indemnification or contribution made by a state-licensed professional for damages or losses from a “Breach of Confidentiality Claim.” See Joint Decl., ECF No. 260-4. Ex. B (“Cohen Settlement Agreement”) at ¶ 2. As Plaintiffs and Zoom both noted, this carve-out from the release directly addresses the core of Objector Cohen’s objection—namely that the allegations in the Lawsuit, if true, expose medical or other professionals who may owe “legal or contractual commitments” to maintain confidentiality to potential claims from third parties, but that the original Settlement Agreement did not address those risks. See, Joint Motion for Approval of Settlements, ECF No. 260 at 4, citing ECF No. 227 at 4-5; ECF No. 236 at 2, 3 (“Any settlement that binds the professional Zoom users must account for this increased risk through future indemnification or by other means”).

The the parties recognize that the Cohen settlement provides value to members of the Class who are professionals that used Zoom in their professional capacities during the class period. As noted in her objection, Cohen identified a discord between the claims as litigated and the scope of

1 the release in this matter. The Second Amended Complaint included the allegation that Zoom’s
 2 misrepresentations regarding E2E encryption and its security protocols are independently
 3 actionable. Doc. 179 at ¶ 14.

4 As noted in the Litigation Parties’ joint motion, this carve-out from the release directly
 5 addresses the core of Objector Cohen’s objection—namely that the Settlement Agreement does not
 6 take into account the risk of possible lawsuits that might be filed against Zoom users who are
 7 medical or other professionals and who may owe “legal or contractual commitments” to maintain
 8 confidentiality. ECF No. 227 at 4-5; ECF No. 236 at 2, 3. The revision to the settlement agreement
 9 preserves such professionals’ ability to seek indemnification or contribution from Zoom in the
 10 event of direct claims tied to the adequacy of Zoom’s encryption.¹ The preservation of this remedy
 11 should deter direct breach of fiduciary duty claims by disgruntled clients or entrepreneurial
 12 attorneys and, in the unlikely event that such claims are brought anyway, provides professionals
 13 the peace of mind that they can call on Zoom to defend its own encryption based on information
 14 only Zoom has. See, Cohen Decl. ¶ 9.

15 C. Request for Fees and Incentive Payment

16 The revised agreement provides that Ms. Cohen may apply to the Court for a service
 17 payment of up to \$1,000, and her counsel may apply to this Court for up to \$78,000 in attorneys’
 18 fees and costs, both of which (if approved) would be paid from the prior award of attorneys’ fees
 19 to Class Counsel. ECF 259-4. Again, the Court’s granting of such payments is not a condition of
 20 the settlement. *Id.* Ms. Cohen now makes that application and it should be approved. Resolution of
 21 Cohen’s appeal through this settlement secures benefits for state-licensed professionals without
 22 taking any money out of the funds allocated for payments to Settlement Class Members. Any
 23 payments to Cohen and her counsel will be made from the Fee and Expense Award that the Court
 24 previously approved for payment to Class Counsel.

25
 26
 27
 28 ¹ Zoom was adamant in settlement discussions that its E2E encryption was not flawed. This revision to the settlement ensures that Zoom is willing to put its money where its mouth is with respect to its customers that use Zoom to conduct business in their professional capacities.

1 III. ARGUMENT

2 A. A Service Award and Award of Fees is Appropriate

3 Federal Rule of Civil Procedure 2 permits class members to object to proposed class action
 4 settlements, Fed. R. Civ. P. 23(e)(5)(A), and requires court approval of any payment in connection
 5 with “forgoing, dismissing, or abandoning an appeal from a judgment approving” a settlement.
 6 Fed. R. Civ. P. 23(e)(5)(B)(ii). Where attorneys for objectors substantially enhanced a benefit to
 7 the class, they should be entitled to fees from the fund created by class action litigation. *Vizcaino*
 8 *v. Microsoft Corp.*, 290 F.3d 1043, 1052 (9th Cir. 2002); *Rodriguez v. Disner (Rodriguez II)*, 688
 9 F.3d 645, 652, 658 (9th Cir. 2012) (reversing a district court's rejection of objectors' fee requests
 10 on the ground that the objectors “did not add anything” to the court's decision as “clearly
 11 erroneous.”)

12 All parties agree that the revisions to the settlement that resulted from Ms. Cohen's
 13 objection were important and substantial and that they therefore meet these standards. See Joint
 14 Motion, ECF 260 at 6. As the Court recognized in its Order granting the Motion for indicative
 15 ruling, the settlement agreement with Ms. Coehn confers added benefits to the Settlement Class:
 16 “... the Cohen settlement benefits the class by narrowing the settlement's release.” ECF No. 257 at
 17 7. the Cohen Settlement Agreement requires the Litigation Parties to narrow the release of
 18 Settlement Class Members' claims in the Settlement Agreement, excluding from that release certain
 19 claims for indemnification or contribution made by a state-licensed professional against Zoom. See
 20 Cohen Settlement Agreement ECF 259-4 ¶ 2.

21 Objector(s) need not confer a specific monetary benefit on the class to recover attorneys'
 22 fees. Substantial benefits can include nonmonetary contributions.” *Marshall v. Northrop Grumman*
 23 *Corp.*, No. 2:16-CV-06794-AB-JCX, 2020 WL 5668963, at *3 (C.D. Cal. Sept. 18, 2020). Courts
 24 in this Circuit recognize that narrowing the scope of a class action settlement release supports an
 25 award of attorneys' fees and an incentive award for the objector. In *In re Sony PS3 “Other OS”*
 26 *Litigation*, No. 10-CV-01811, 2018 WL 2763337 (N.D. Cal. June 8, 2018)), the court noted that
 27 the modified settlement agreement—which had been amended due to an objector's concerns—
 28 “eliminated unfair terms such as the release” and “provided some material benefit to the class.” *Id.*

1 Despite finding that the improvements to the settlement were “not attributable entirely to the
2 objections raised, the Court finds that Objector Lindberg’s contribution provided some material
3 benefit to the class” and awarded fees to the objector. *Id.* at *3.

4 Similar to the situation here, the court in *Hendricks v. Starkist Co.* awarded objectors’
5 attorneys’ fees where objectors briefed an issue involving the release that both plaintiffs and
6 defendants did not address in the original agreement and preserved potential future causes of action.
7 Case No. 13-cv-00729-HSG, 2016 WL 5462423 at *15 (N.D. Cal. Sept. 29, 2016). The court found
8 that these actions had “substantially enhanced the benefits to the class.” *Id.* Notably, the
9 modification achieved by objectors’ counsel amounted to a five-word addition limiting the release
10 to legal claims “arising from the factual allegations.” *Id.* at *3. In *Kurihara v. Best Buy Co.*, the
11 court found that an objector conferred a substantial benefit on the class by clarifying the scope of
12 the release to ensure that only specific claims were released and that others were protected from
13 release. Case No. C-06-1884-MHP (ECM), 2010 WL 11575583 at *3 (N.D. Cal. June 7, 2010).
14 The court awarded fees to the objector. *Id.* See also, *Kurihara v. Best Buy Co.*, No. C06-1884 MHP
15 (EMC), 2010 WL 11575583, at *3 (N.D. Cal. June 7, 2010) (finding a substantial benefit conferred
16 to the class where an objector achieved clarification of the settlement’s releases), R. & R. adopted,
17 No. C-06-1884 MHP (EMC), 2010 WL 11575584 (N.D. Cal. July 6, 2010).

18 These cases highlight that an objector need not confer a specific monetary benefit on the
19 class to recover attorneys’ fees. Substantial benefits can include non-monetary contributions. Here,
20 the specific right of a professional facing a claim based on Zoom’s E2E encryption does not have
21 to worry about the expense of litigation knowing that if facing a claim, they can call on Zoom to
22 defend the adequacy of its encryption. This exclusion has a substantial deterrent effect on anyone
23 —client or entrepreneurial lawyer—inclined to take advantage of the apparent disconnect between
24 the factual allegations in the complaint and the original scope of the release. The narrowing of the
25 release, and Class Members’ ability to implead Zoom in the event they face allegations that they
26 violated guarantees of confidentiality supports the approval of the requested fees and service award
27 to Cohen as contemplated in the Agreement.

28 Finally, the contemplated service awards to Cohen and fee and expense awards to counsel

will not adversely impact the original Settlement Class as these payments will be drawn solely from the prior Fee and Expense Award. *See Charvat v. Valente*, No. 1:12-cv-05746, ECF No. 744 at 2 (February 27, 2020) (granting motion for indicative ruling and noting that payments to objectors’ counsel “would not come from the net settlement fund”); *In re Takata Airbag Products Liability Litig.*, No. 1:15-md-02599, ECF No. 3632 at 2 (“Most importantly, not a single penny of the proposed payment will be taken from the funds available to all class members.”). The value to the Settlement Class is fully insulated from any service award to Cohen and fees and costs to counsel. Moreover, because counsel seeks only its lodestar with no enhancement, the reduction in fees to class counsel is less than .4% of their total fee award ensuring that there will be no diminution in the willingness of class counsel to take such cases in the future.

B. The Requested Amounts are Reasonable.

The service award of \$1,000 is significantly lower than the service award to the named Plaintiffs in the litigations. Cohen, like the named Plaintiffs, provided information and documents to support the litigation, but were not deposed.

The settlement agreement states that Ms. Cohen may apply to this Court for up to \$78,000 in attorneys’ fees and costs which would be paid from the prior award of attorneys’ fees to class counsel. Ms. Cohen asks that the Court approve fees and costs in that amount. As the Court previously noted, while the award of fees should ordinarily be based on a percentage of the benefits the objector conferred on the class, “the percentage calculation can be “replaced by a lodestar calculation.” Order Granting Motion for Indicative Ruling, ECF No. 257 at 5, citing *Wininger v. SI Mgmt. L.P.*, 301 F.3d 1115, 1127 (9th Cir. 2002) (cleaned up). Here, the requested fees and reimbursement of costs is based on a lodestar calculation.

As required, the requested fees are supported by counsel’s detailed time records showing the time expended, the dates on which they were expended, and descriptions of the work performed. See Brown Decl. ¶ 7, Exhibit 1; Boebel Decl. ¶ 5, Exhibit 1. Ms. Cohen’s counsel respectfully submit that the time spent and their respective hourly rates are reasonable and counsel is not requesting that they be enhanced by a multiplier.

Ms. Cohen's attorneys collectively devoted over 124.2 hours over more than a year to investigating and pursuing her objection, to pursuing her appeal, and to mediating and negotiating with counsel for the Class and for Defendant. Brown Decl. ¶¶ 7-8; Boebel Decl.) ¶¶ 3-5. This does not include the hours Counsel wrote off through the exercise of billing judgment. Ms. Cohen's counsel pursued this matter without guarantee of payment and at a time when most of their work was billed on hourly, non-contingent fee work. Brown Decl. ¶¶ 2, 9; Boebel Decl. ¶ 5. *See Moreno v. City of Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008) ("[L]awyers are not likely to spend unnecessary time on contingency fee cases in the hope of inflating their fees. The payoff is too uncertain, as to both the result and the amount of the fee."). Counsel further incurred costs of \$847 comprised mostly of court filing and *Pro Hac Vice* fees. Brown Decl. ¶ 11.

Counsel's hourly rates of \$650 are reasonable for the San Francisco legal market. "To determine the prevailing market rate, courts may rely on attorney affidavits as well as 'decisions by other courts awarding similar rates for work in the same geographical area by attorneys with comparable levels of experience.'" (citation omitted)). In assessing the reasonableness of an hourly rate, courts consider the usual billing rate, the level of skill required, time limitations imposed on the litigation, the amount of the potential recovery, the attorney's reputation, and the undesirability of the case." *Rivas v. BG Retail, LLC*, No. 16-cv-06458-BLF, 2020 WL 264401, at *7 (N.D. Cal. Jan. 16, 2020). Ms. Cohen's counsel are experienced litigators, each with more than 20 years of litigation experience. Her attorneys have provided the Court with declarations describing their background and experience. Counsel's hourly rates are in line with rates of attorneys of similar skill and experience and are lower than the hourly rates submitted by Plaintiffs' Class Counsel of similar experience. See, e.g., Declaration of Mark Molumphy (ECF No. 218-2) Exs. A, B (indicating rates by attorneys with 22 years experience as \$750 per hour, and attorneys with 8 years experience as \$675 per hour).

Ms. Cohen's Counsel's lodestar amounts to \$80,730 plus costs which is made up of Ari Brown, 84.6 hours (\$54,990); Nicholas Boebel, 32.8 hours (\$21,320); John Giust 6.8 hours (\$4,400). Ms. Cohen is requesting an amount that is less than the total lodestar.

1 **IV. CONCLUSION**

2 For the reasons discussed above, the Court should approve Ms. Cohen's request for an
3 incentive payment of \$1,000 and for her attorneys' fees and expenses of \$78,000.

4 Dated: December 27, 2022

6 LAW OFFICE OF ARI BROWN

7 

8 By: Ari Y. Brown, WSBA #29570
9 *Pro Hac Vice*
3909 47th Ave. S
10 Seattle, Washington 98118
Tel: (206) 412-9320
11 abrownesq@gmail.com
Attorneys for Plaintiffs

12 GIUST LAW
13 /s/ John E. Giust
By: John E. Giust
14 9625 Black Mountain Road
Suite 205
15 San Diego, CA 92126
(619) 993-1656
16 john@giustlaw.com

17 Attorneys for Objector:
Judith C. Cohen